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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 26 and 602

TD 9208

RIN 1545-BB54

Election Out of GST Deemed Allocations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations providing guidance for making the election under section

2632(c)(5)(A)(i) of the Internal Revenue Code to not have the deemed allocation of unused generation-skipping transfer (GST) tax exemption under

section 2632(c)(1) apply with regard to certain transfers to a GST trust, as defined in section 2632(c)(3)(B). The final regulations also provide guidance for making the election under section 2632(c)(5)(A)(ii) to treat a trust as a GST trust. The regulations primarily affect individuals.

DATES: Effective Date: The regulations are effective June 29, 2005.

Applicability Date: For dates of applicability, see §26.2632-1(e).

FOR FURTHER INFORMATION CONTACT: Mayer R. Samuels,
(202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1892.

The collection of information in these final regulations is in §26.2632-1(b)(2)(iii) and (b)(3). This information is required by the IRS for taxpayers who elect to have the automatic allocation rules not apply to the current transfer and/or to future transfers to the trust or to terminate such election. This information is also required by the IRS for taxpayers who elect to treat trusts described in section 2632(c)(3)(B)(i) through (vi) as GST trusts or to terminate such election.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to this collection of information must be retained as long as their contents may

become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR Part 26 under section 2632-1 pertaining to the election under section 2632(c)(5)(A)(i) of the Internal Revenue Code to not have the deemed allocation of unused generation-skipping transfer (GST) tax exemption under section 2632(c)(1) apply with regard to certain transfers to a GST trust, as defined in section 2632(c)(3)(B) and the election under section 2632(c)(5)(A)(ii) to treat a trust as a GST trust.

On July 13, 2004, the IRS published (REG-153841-02) in the **Federal Register** a notice of proposed rulemaking (69 FR 42000). The IRS received written and oral comments responding to the notice of proposed rulemaking. No public hearing was requested or held. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision, and the corresponding proposed regulations are removed. The comments and revisions to the proposed regulations are discussed below.

Summary of Comments

The proposed regulations generally permitted transferors

only two options for electing out of the automatic allocation rules. Transferors could elect out with respect to a current transfer only, or with respect to a current-year transfer and all future transfers to the same trust. Several commentators suggested that the final regulations provide transferors additional options. In response to these comments, the final regulations include the options provided in the proposed regulations and, in addition, give transferors the option of electing out with respect to (1) only certain designated future transfers to a trust, or (2) all future transfers made by the transferor to any trust (regardless of whether the trust exists at the time of the election out). Under the final regulations, the transferor may elect out with respect to future transfers even if the transferor has not made a current-year transfer and is not otherwise required to file a Federal gift tax return. Examples have been added illustrating language that may be used in the election out statement to satisfy the requirements for the various election out options.

One commentator suggested that the statements required by the regulations to elect out of the automatic GST allocation or to treat a trust as a GST trust should not require a citation to the specific regulation section that authorizes

the election. The final regulations adopt this suggestion.

In response to comments, the final regulations have been clarified to specifically confirm that an election out of the automatic allocation rules for future years is limited to automatic allocations under section 2632(c) (automatic allocations to indirect skips made during the transferor's lifetime) and has no effect on the automatic allocation rules that apply after the transferor's death under section 2632(e).

One commentator recommended that the IRS clarify whether the effective date of an automatic allocation is changed if the transfer is reported on a late filed Federal gift tax return. For indirect skips made after December 31, 2000, to which section 2642(f) does not apply, the transferor's unused GST exemption is automatically allocated to the property transferred. Section 26.2632-1(b)(1)(ii) generally provides that in the case of direct skips, unless the transferor elects out of the automatic allocation rules, the automatic allocation becomes irrevocable on the due date for filing the Federal gift tax return, and the allocation is effective as of the date of the transfer. Thus, even if the Federal gift tax return reporting the transfer is filed late, or no Federal gift tax return is filed, the automatic allocation

nevertheless is irrevocable on the due date of that return and takes effect as of the date of the transfer. The final regulations clarify that the same rules apply in the case of an automatic allocation to an indirect skip under section 2632(c). The automatic allocation is effective as of the date of the transfer, and becomes irrevocable on the due date for filing the Form 709 for the calendar year in which the transfer is made, whether or not a gift tax return is filed reporting the transfer.

Commentators suggested that, if a transferor makes an indirect skip and affirmatively allocates GST exemption in an amount that is less than the value of the property transferred, the transaction should be treated as an allocation of the amount that was affirmatively allocated and an election out of the automatic allocation rules for the value of the property not covered by the exemption amount affirmatively allocated. Treasury and the IRS agree with the commentators that this treatment would give effect to the transferor's most likely intent to limit the allocation of exemption to the amount that was affirmatively allocated. Accordingly, under the final regulations, an affirmative partial allocation of GST exemption is treated as an election out of the automatic allocation rules with regard to the

balance of that specific transfer.

In response to comments, the rules regarding the automatic allocation to an indirect skip subject to an estate tax inclusion period (ETIP) have been revised in conformance with section 2632(c)(4) to provide that the automatic allocation to a direct skip or an indirect skip is deemed to be made at the close of the ETIP. Therefore, under the final regulations, a transferor may elect out of the automatic allocation rules for transfers subject to an ETIP that are either direct skips or indirect skips at any time prior to the due date of the Federal gift tax return for the calendar year during which the ETIP closes. Thus, transferors may elect out of the automatic allocation rules on the gift tax return reporting the transfer to the trust, or on a gift tax return filed for any calendar year subsequent to the year of the transfer up to and including the calendar year in which the ETIP closes. It should be noted that an election out of the automatic allocation for "all current transfers" or for "all transfers in the current year" includes an election out for a transfer subject to an ETIP that was made during that year, but an election out of the automatic allocation rules for "all future transfers" to a trust will not apply with respect to any previous transfer to a trust subject to an ETIP that is to

close in the future. To apply the election out to prior-year transfers that are subject to an ETIP, the election out statement must specifically describe the prior-year transfers to be covered by the election out, state that those transfers are subject to an ETIP, and state that the transferor wishes to elect out of the automatic allocation to those prior-year transfers. Except in that limited circumstance, the final regulations provide that an election out does not apply to any prior-year transfer to a trust, including a transfer subject to an ETIP, even if the ETIP closes after the election has been made. It should be noted also that, once an affirmative allocation of GST exemption has been made (including to a transfer subject to an ETIP), the allocation may not be revoked.

One commentator recommended that transferors who made indirect skips after December 31, 2000, and before the proposed regulations become final, should be allowed to elect out of the automatic allocation rules on or before April 15th of the calendar year after the year in which the final regulations are published. The Treasury Department and the IRS believe, however, that this extension of the time to elect out of the automatic allocation rules is unnecessary. Notice 2001-50 (2001-2 C.B. 189) (see §601.601(d)(2)(ii)(b) of this

chapter) alerted transferors that regulations would provide that an election under section 2632(c)(5) is to be made on a timely filed Federal gift tax return reporting the transfer. Further, the preamble to the proposed regulations provided that any election made on or before the date of publication of the proposed regulations will be recognized if the election was made on a timely filed Federal gift tax return in a manner that provided adequate notice to the Commissioner that the transferor made the election. Accordingly, this suggestion was not adopted.

Commentators suggested that the regulations include an example addressing the application of the automatic allocation rules for indirect skips in a situation in which a trust subject to an ETIP terminates upon the expiration of the ETIP, at which time the trust assets are distributed to other trusts that may be GST trusts. The Treasury Department and the IRS believe, however, that this issue is outside the scope of this regulation, and will consider whether to address the issue in separate guidance.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose on small entities, a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6), does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the Notice of Proposed Rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these final regulations is Mayer R. Samuels, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department also participated in their development.

List of Subjects26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 26 and 602 are amended as follows:

PART 26--GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER
THE TAX REFORM ACT OF 1986

Paragraph 1. The authority citation for part 26 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In §26.2600-1, the entries for §26.2632-1 are amended by revising the entry for paragraph (b)(2) and adding entries for paragraphs (b)(3), (b)(4) and (e) to read as follows:

§26.2600-1 Table of contents.

* * * * *

§26.2632-1 Allocation of GST exemption.

* * * * *

(b) * * *

(2) Automatic allocation to indirect skips made after
December 31, 2000.

(3) Election to treat trust as GST trust.

(4) Allocation to other transfers.

* * * * *

(e) Effective date.

* * * * *

Par. 3. Section 26.2632-1 is amended as follows:

1. Paragraph (b)(2) is redesignated as paragraph (b)(4).
2. Paragraphs (b)(2) and (b)(3) are added.
3. In newly designated paragraph (b)(4)(i), the third sentence is revised.
4. In newly designated paragraph (b)(4)(ii)(A)(1), the fourth sentence is revised.
5. In newly designated paragraph (b)(4)(ii)(B):
 - a. All references to paragraph "(b)(2)(ii)(A)(1)(i)" are removed and "(b)(4)(ii)(A)(1)(i)" is added in its place.
 - b. All references to paragraph "(b)(2)(ii)(A)(1)(ii)" are removed and "(b)(4)(ii)(A)(1)(ii)" is added in its place.
 - c. All references to paragraph "(b)(2)(ii)(A)(1)(iii)" are removed and "(b)(4)(ii)(A)(1)(iii)" is added in its place.
6. Examples 1 through 5 in newly designated paragraph (b)(4)(iii) are revised.
7. Example 6 in newly designated paragraph (b)(4)(iii) is added.
8. Paragraph (b)(4)(iv) is added.
9. Paragraph (c)(1) is redesignated as paragraph (c)(1)(i) and revised.
10. Paragraphs (c)(1)(ii) and (c)(1)(iii) are added.
11. Example 5 in paragraph (c)(5) is added.

12. In paragraph (d)(1), the fourth sentence is revised.

13. Paragraph (e) is added.

The additions and revisions read as follows:

§ 26.2632-1 Allocation of GST exemption.

* * * * *

(b) * * *

(2) Automatic allocation to indirect skips made after December 31, 2000--(i) In general. An indirect skip is a transfer of property to a GST trust as defined in section 2632(c)(3)(B) provided that the transfer is subject to gift tax and does not qualify as a direct skip. In the case of an indirect skip made after December 31, 2000, to which section 2642(f) (relating to transfers subject to an estate tax inclusion period (ETIP)) does not apply, the transferor's unused GST exemption is automatically allocated to the property transferred (but not in excess of the fair market value of the property on the date of the transfer). The automatic allocation pursuant to this paragraph is effective whether or not a Form 709 is filed reporting the transfer, and is effective as of the date of the transfer to which it relates. An automatic allocation is irrevocable after the due date of the Form 709 for the calendar year in which the transfer is made. In the case of an indirect skip to which

section 2642(f) does apply, the indirect skip is deemed to be made at the close of the ETIP and the GST exemption is deemed to be allocated at that time. In either case, except as otherwise provided in paragraph (b)(2)(ii) of this section, the automatic allocation of exemption applies even if an allocation of exemption is made to the indirect skip in accordance with section 2632(a).

(ii) Prevention of automatic allocation. Except as otherwise provided in forms or other guidance published by the Service, the transferor may prevent the automatic allocation of GST exemption with regard to an indirect skip (including indirect skips to which section 2642(f) may apply) by making an election, as provided in paragraph (b)(2)(iii) of this section. Notwithstanding paragraph (b)(2)(iii)(B) of this section, the transferor may also prevent the automatic allocation of GST exemption with regard to an indirect skip by making an affirmative allocation of GST exemption on a Form 709 filed at any time on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) of an amount that is less than (but not equal to) the value of the property transferred as reported on that return, in accordance with the provisions of paragraph (b)(4) of this section. See paragraph (b)(4)(iii) Example 6 of this section.

Any election out of the automatic allocation rules under this section has no effect on the application of the automatic allocation rules applicable after the transferor's death under section 2632(e) and paragraph (d) of this section.

(iii) Election to have automatic allocation rules not apply--(A) In general. A transferor may prevent the automatic allocation of GST exemption (elect out) with respect to any transfer or transfers constituting an indirect skip made to a trust or to one or more separate shares that are treated as separate trusts under §26.2654-1(a)(1) (collectively referred to hereinafter as a trust). In the case of a transfer treated under section 2513 as made one-half by the transferor and one-half by the transferor's spouse, each spouse shall be treated as a separate transferor who must satisfy separately the requirements of paragraph (b)(2)(iii)(B) to elect out with respect to the transfer. A transferor may elect out with respect to--

(1) One or more prior-year transfers subject to section 2642(f) (regarding ETIPs) made by the transferor to a specified trust or trusts;

(2) One or more (or all) current-year transfers made by the transferor to a specified trust or trusts;

(3) One or more (or all) future transfers made by the transferor to a specified trust or trusts;

(4) All future transfers made by the transferor to all trusts (whether or not in existence at the time of the election out); or

(5) Any combination of paragraphs (b)(2)(iii)(A)(1) through (4) of this section.

(B) Manner of making an election out. Except as otherwise provided in forms or other guidance published by the IRS, an election out is made as described in this paragraph (b)(2)(iii)(B). To elect out, the transferor must attach a statement (election out statement) to a Form 709 filed within the time period provided in paragraph (b)(2)(iii)(C) of this section (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). See paragraph (b)(4)(iv) Example 7 of this section. The election out statement must identify the trust (except for an election out under paragraph (b)(2)(iii)(A)(4) of this section), and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Prior-year transfers that are subject to section 2642(f), and to which

the election out is to apply, must be specifically described or otherwise identified in the election out statement.

Further, unless the election out is made for all transfers made to the trust in the current year and/or in all future years, the current-year transfers and/or future transfers to which the election out is to apply must be specifically described or otherwise identified in the election out statement.

(C) Time for making an election out. To elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) of the Form 709 for the calendar year in which--

(1) For a transfer subject to section 2642(f), the ETIP closes; or

(2) For all other elections out, the first transfer to be covered by the election out was made.

(D) Effect of election out. An election out does not affect the automatic allocation of GST exemption to any transfer not covered by the election out statement. Except for elections out for transfers described in paragraph (b)(2)(iii)(A)(1) of this section that are specifically described in an election out statement, an election out does

not apply to any prior-year transfer to a trust, including any transfer subject to an ETIP (even if the ETIP closes after the election is made). An election out does not prevent the transferor from allocating the transferor's available GST exemption to any transfer covered by the election out, either on a timely filed Form 709 reporting the transfer or at a later date in accordance with the provisions of paragraph (b)(4) of this section. An election out with respect to future transfers remains in effect unless and until terminated. Once an election out with respect to future transfers is made, a transferor need not file a Form 709 in future years solely to prevent the automatic allocation of the GST exemption to any future transfer covered by the election out.

(E) Termination of election out. Except as otherwise provided in forms or other guidance published by the IRS, an election out may be terminated as described in this paragraph (b)(2)(iii)(E). Pursuant to this section, a transferor may terminate an election out made on a Form 709 for a prior year, to the extent that election out applied to future transfers or to a transfer subject to section 2642(f). To terminate an election out, the transferor must attach a statement (termination statement) to a Form 709 filed on or before the

due date of the Form 709 for the calendar year in which is made the first transfer to which the election out is not to apply (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). The termination statement must identify the trust (if applicable), describe the prior election out that is being terminated, specifically provide that the prior election out is being terminated, and either describe the extent to which the prior election out is being terminated or describe any current-year transfers to which the election out is not to apply. Consequently, the automatic allocation rules contained in section 2632(c)(1) will apply to any current-year transfer described on the termination statement and, except as otherwise provided in this paragraph, to all future transfers that otherwise would have been covered by the election out. The termination of an election out does not affect any transfer, or any election out, that is not described in the termination statement. The termination of an election out will not revoke the election out for any prior-year transfer, except for a prior-year transfer subject to section 2642(f) for which the election out is revoked on a timely filed Form 709 for the calendar year in which the ETIP closes or for any

prior calendar year. The termination of an election out does not preclude the transferor from making another election out in the same or any subsequent year.

(3) Election to treat trust as a GST trust--(i) In general. A transferor may elect to treat any trust as a GST trust (GST trust election), without regard to whether the trust is subject to section 2642(f), with respect to--

(A) Any current-year transfer (or any or all current-year transfers) by the electing transferor to the trust;

(B) Any selected future transfers by the electing transferor to the trust;

(C) All future transfers by the electing transferor to the trust; or

(D) Any combination of paragraphs (b)(3)(i)(A) through (C) of this section.

(ii) Time and Manner of making GST trust election.

Except as otherwise provided in forms or other guidance published by the Internal Revenue Service, a GST trust election is made as described in this paragraph (b)(3)(ii). To make a GST trust election, the transferor must attach a statement (GST trust election statement) to a Form 709 filed on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) of the Form

709 for the calendar year in which the first transfer to be covered by the GST trust election is made (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). The GST trust election statement must identify the trust, specifically describe or otherwise clearly identify the transfers to be covered by the election, and specifically provide that the transferor is electing to have the trust treated as a GST trust with respect to the covered transfers.

(iii) Effect of GST trust election. Except as otherwise provided in this paragraph, a GST trust election will cause all transfers made by the electing transferor to the trust that are subject to the election to be deemed to be made to a GST trust as defined in section 2632(c)(3)(B). Thus, the electing transferor's unused GST exemption may be allocated automatically to such transfers in accordance with paragraph (b)(2) of this section. A transferor may prevent the automatic allocation of GST exemption to future transfers to the trust either by terminating the GST trust election in accordance with paragraph (b)(3)(iv) of this section (in the case of trusts that would not otherwise be treated as GST

trusts) or by electing out of the automatic allocation of GST exemption in accordance with paragraph (b)(2) of this section.

(iv) Termination of GST trust election. Except as otherwise provided in forms or other guidance published by the Service, a GST trust election may be terminated as described in this paragraph (b)(3)(iv). A transferor may terminate a GST trust election made on a Form 709 for a prior year, to the extent that election applied to future transfers or to a transfer subject to section 2642(f). To terminate a GST trust election, the transferor must attach a statement (termination statement) to a Form 709 filed on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) a Form 709 for the calendar year: in which is made the electing transferor's first transfer to which the GST trust election is not to apply; or that is the first calendar year for which the GST trust election is not to apply, even if no transfer is made to the trust during that year. The termination statement must identify the trust, describe the current-year transfer (if any), and provide that the prior GST trust election is terminated. Accordingly, if the trust otherwise does not satisfy the definition of a GST trust, the automatic allocation rules contained in section 2632(c)(1) will not apply to the described current-year

transfer or to any future transfers made by the transferor to the trust, unless and until another election under this paragraph (b)(3) is made.

(4) * * *(i) * * * See paragraph (b)(4)(ii) of this section. * * *

(ii) * * *(A) * * * (1) * * * For purposes of this paragraph (b)(4)(ii), the Form 709 is deemed filed on the date it is postmarked to the Internal Revenue Service address as directed in forms or other guidance published by the Service.

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(iii) Examples. The following examples illustrate the provisions of this paragraph (b):

Example 1. Modification of allocation of GST exemption.

On December 1, 2003, T transfers \$100,000 to an irrevocable GST trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 2004. On February 10, 2004, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) with respect to the transfer in accordance with paragraph (b)(2)(iii) of this section, and allocates \$50,000 of GST exemption to the trust. On April 13th of the same year, T files an additional Form 709 on which T confirms the election out of the automatic allocation rules contained in section 2632(c)(1) and allocates \$100,000 of GST exemption to the trust in a manner that clearly indicates the intention to modify and supersede the prior allocation with respect to the 2003 transfer. The allocation made on the April 13 return supersedes the prior allocation because it is made on a timely-filed Form 709 that clearly identifies the trust and the nature and extent of the modification of GST

exemption allocation. The allocation of \$100,000 of GST exemption to the trust is effective as of December 1, 2003. The result would be the same if the amended Form 709 decreased the amount of the GST exemption allocated to the trust.

Example 2. Modification of allocation of GST exemption.

The facts are the same as in Example 1 except, on July 8, 2004, T files a Form 709 attempting to reduce the earlier allocation. The return filed on July 8, 2004, is not a timely filed return. The \$100,000 GST exemption allocated to the trust, as amended on April 13, 2004, remains in effect because an allocation, once made, is irrevocable and may not be modified after the last date on which a timely filed Form 709 may be filed.

Example 3. Effective date of late allocation of GST exemption. On November 15, 2003, T transfers \$100,000 to an irrevocable GST trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 2004. On February 10, 2004, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) in accordance with paragraph (b)(2)(iii) of this section with respect to that transfer. On December 1, 2004, T files a Form 709 and allocates \$50,000 to the trust. The allocation is effective as of December 1, 2004.

Example 4. Effective date of late allocation of GST exemption. T transfers \$100,000 to an irrevocable GST trust on December 1, 2003, in a transfer that is not a direct skip. On April 15, 2004, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) with respect to the entire transfer in accordance with paragraph (b)(2)(iii) of this section and T does not make an allocation of any GST exemption on the Form 709. On September 1, 2004, the trustee makes a taxable distribution from the trust to T's grandchild in the amount of \$30,000. Immediately prior to the distribution, the value of the trust assets was \$150,000. On the same date, T allocates GST exemption to the trust in the amount of \$50,000. The allocation of GST exemption on the date of the transfer is treated as preceding in point of time the taxable distribution. At the time of the GST, the trust has an inclusion ratio of .6667 ($1 - (50,000/150,000)$).

Example 5. Automatic allocation to split-gift. On December 1, 2003, T transfers \$50,000 to an irrevocable GST Trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. On April 30, 2004, T and T's spouse, S, each files an initial gift tax return for 2003, on which they consent, pursuant to section 2513, to have the gift treated as if one-half had been made by each. In spite of being made on a late-filed gift tax return for 2003, the election under section 2513 is valid because neither spouse had filed a timely gift tax return for that year. Previously, neither T nor S filed a timely gift tax return electing out of the automatic allocation rules contained in section 2632(c)(1). As a result of the election under section 2513, which is retroactive to the date of T's transfer, T and S are each treated as the transferor of one-half of the property transferred in the indirect skip. Thus, \$25,000 of T's unused GST exemption and \$25,000 of S's unused GST exemption is automatically allocated to the trust. Both allocations are effective on and after the date that T made the transfer. The result would be the same if T's transfer constituted a direct skip subject to the automatic allocation rules contained in section 2632(b).

Example 6. Partial allocation of GST exemption. On December 1, 2003, T transfers \$100,000 to an irrevocable GST trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 2004. On February 10, 2004, T files a Form 709 on which T allocates \$40,000 of GST exemption to the trust. By filing a timely Form 709 on which a partial allocation is made of \$40,000, T effectively elected out of the automatic allocation rules for the remaining value of the transfer for which T did not allocate GST exemption.

(iv) Example. The following example illustrates language that may be used in the statement required under paragraph (b)(2)(iii) of this section to elect out of the automatic allocation rules under various scenarios:

Example 1. On March 1, 2006, T transfers \$100,000 to Trust B, a GST trust described in section 2632(c)(3)(B). Subsequently, on September 15, 2006, T transfers an additional \$75,000 to Trust B. No other transfers are made to Trust B in 2006. T attaches an election out statement to a timely filed Form 709 for calendar year 2006. Except with regard to paragraph (v) of this Example 1, the election out statement identifies Trust B as required under paragraph (b)(2)(iii)(B) of this section, and contains the following alternative election statements:

(i) "T hereby elects that the automatic allocation rules will not apply to the \$100,000 transferred to Trust B on March 1, 2006." The election out of the automatic allocation rules will be effective only for T's March 1, 2006, transfer and will not apply to T's \$75,000 transfer made on September 15, 2006.

(ii) "T hereby elects that the automatic allocation rules will not apply to any transfers to Trust B in 2006." The election out of the automatic allocation rules will be effective for T's transfers to Trust B made on March 1, 2006, and September 15, 2006.

(iii) "T hereby elects that the automatic allocation rules will not apply to any transfers to Trust B made by T in 2006 or to any additional transfers T may make to Trust B in subsequent years." The election out of the automatic allocation rules will be effective for T's transfers to Trust B in 2006 and for all future transfers to be made by T to Trust B, unless and until T terminates the election out of the automatic allocation rules.

(iv) "T hereby elects that the automatic allocation rules will not apply to any transfers T has made or will make to Trust B in the years 2006 through 2008." The election out of the automatic allocation rules will be effective for T's transfers to Trust B in 2006 through 2008. T's transfers to Trust B after 2008 will be subject to the automatic allocation rules, unless T elects out of those rules for one or more years after 2008. T may terminate the election out of the automatic allocation rules for 2007, 2008, or both in accordance with the termination rules of paragraph (b)(2)(iii)(E) of this section. T may terminate the election

out for one or more of the transfers made in 2006 only on a later but still timely filed Form 709 for calendar year 2006.

(v) "T hereby elects that the automatic allocation rules will not apply to any current or future transfer that T may make to any trust." The election out of the automatic allocation rules will be effective for all of T's transfers (current-year and future) to Trust B and to any and all other trusts (whether such trusts exist in 2006 or are created in a later year), unless and until T terminates the election out of the automatic allocation rules. T may terminate the election out with regard to one or more (or all) of the transfers covered by the election out in accordance with the termination rules of paragraph (b)(2)(iii)(E) of this section.

(c) Special rules during an estate tax inclusion period-

-(1) In general--(i) Automatic allocations with respect to direct skips and indirect skips. A direct skip or an indirect skip that is subject to an estate tax inclusion period (ETIP) is deemed to have been made only at the close of the ETIP. The transferor may prevent the automatic allocation of GST exemption to a direct skip or an indirect skip by electing out of the automatic allocation rules at any time prior to the due date of the Form 709 for the calendar year in which the close of the ETIP occurs (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). See paragraph (b)(2)(i) of this section regarding the automatic allocation of GST exemption to an indirect skip subject to an ETIP.

(ii) Other allocations. An affirmative allocation of GST exemption cannot be revoked, but becomes effective as of (and no earlier than) the date of the close of the ETIP with respect to the trust. If an allocation has not been made prior to the close of the ETIP, an allocation of exemption is effective as of the close of the ETIP during the transferor's lifetime if made by the due date for filing the Form 709 for the calendar year in which the close of the ETIP occurs (timely ETIP return). An allocation of exemption is effective in the case of the close of the ETIP by reason of the death of the transferor as provided in paragraph (d) of this section.

(iii) Portion of trust subject to ETIP. If any part of a trust is subject to an ETIP, the entire trust is subject to the ETIP. See §26.2642-1(b)(2) for rules determining the inclusion ratio applicable in the case of GSTs during an ETIP.

* * * * *

(5) * * *

Example 5. Election out of automatic allocation of GST exemption for trust subject to an ETIP. On December 1, 2003, T transfers \$100,000 to Trust A, an irrevocable GST trust described in section 2632(c)(3) that is subject to an estate tax inclusion period (ETIP). T made no other gifts in 2003. The ETIP terminates on December 31, 2008. T timely files a gift tax return (Form 709) reporting the gift on April 15, 2004. On May 15, 2006, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) with respect to the December 1, 2003, transfer to Trust A in accordance with paragraph (b)(2)(iii)

of this section. Because the indirect skip is not deemed to occur until December 31, 2008, T's election out of automatic GST allocation filed on May 15, 2006, is timely, and will be effective as of December 31, 2008 (unless revoked on a Form 709 filed on or before the due date of a Form 709 for calendar year 2008).

(d) * * *(1) * * * A late allocation of GST exemption by an executor, other than an allocation that is deemed to be made under section 2632(b)(1) or (c)(1), with respect to a lifetime transfer of property is made on Form 706, Form 706NA, or Form 709 (filed on or before the due date of the transferor's estate tax return) and applies as of the date the allocation is filed. * * *

* * * * *

(e) Effective dates. This section is applicable as provided in §26.2601-1(c), with the following exceptions:

(1) Paragraphs (b)(2) and (b)(3), the third sentence of paragraph (b)(4)(i), the fourth sentence of paragraph (b)(4)(ii)(A)(1), paragraphs (b)(4)(iii) and (b)(4)(iv), and the fourth sentence of paragraph (d)(1) of this section, which will apply to elections made on or after July 13, 2004; and

(2) Paragraph (c)(1), and Example 5 of paragraph (c)(5), which will apply to elections made on or after June 29, 2005.

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION
ACT

Par. 4. The authority citation for part 602 continues to
read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (b) is amended by adding
an entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

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(b) * * *

<u>CFR part or section where</u> <u>OMB</u> <u>identified and described</u> <u>No.</u>	<u>Current</u> <u>control</u>
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26.2632-1.....	1545-
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Mark E. Matthews
Deputy Commissioner for Services and
Enforcement.

Approved: June 21, 2005

Eric Solomon
Acting Deputy Assistant Secretary for Tax
Policy.

